

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1233

76-CR-245

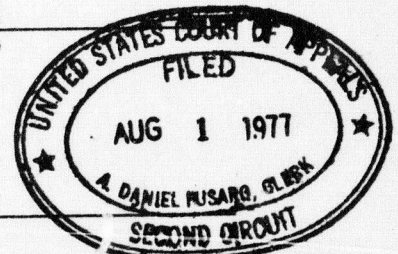
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
EDWARD MOORE, WILLIAM LAING,
Defendant-Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT
EDWARD MOORE



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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Cases and Other Authorities Cited	i
Questions Presented.	ii
Preliminary Statement	1
Statement of Facts	2
Argument:	
<u>POINT ONE:</u> THE TRIAL COURT ERRED IN ITS DENIAL OF THE DEFENDANT'S MOTION FOR A MIS- TRIAL BASED UPON THE PROSECUTOR'S PREJUDICIAL REMARKS MADE IN THE PRESENCE OF THE JURY.	10
<u>POINT TWO:</u> THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE A TAPE RECORDED CONVER- SATION OF THE DEFENDANT WITHOUT A PROPER FOUNDATION HAVING BEEN LAID TO ESTABLISH ITS AUTHENTICITY	14
Conclusion	23

TABLE OF CASES, STATUTES
AND OTHER AUTHORITIES CITED

	<u>PAGE</u>
<u>American Bar Association Code of Responsibility, Disciplinary Rule</u> , 7-106(c)(2), page 88 (1969)	13
<u>Berger v. U.S.</u> , 295 U.S. 78, 55 S.Ct. (1934)	12
<u>Brandow v. U.S.</u> , 268 F.2d 559 (1959)	19
<u>Bruce v. Estelle</u> , 482 F.2d 1031 (5th Cir., 1973)	13
<u>Burgman v. U.S.</u> , 88 App. D.C. 184, 188 F.2d 637, cert. den., 342 U.S. 838, 72 S.Ct. 64 (1951)	18
<u>Gellars v. U.S.</u> , 87 App. D.C. 16, 182 F.2d 962 (1950)	18
<u>Gradsky v. U.S.</u> , 373 F.2d 706 (5th Cir., 1967)	13
<u>Hall v. U.S.</u> , 419 F.2d 582 (5th Cir., 1969).	13
<u>McMillan v. U.S.</u> 363 F.2d 165 (5th Cir., 1966)	12
<u>Monroe v. U.S.</u> , 98 App. D.C. 228, 234 F.2d 49, cert. den. 352 U.S. 873, 77 S.Ct. 94 (1956)	19
<u>Spindler v. U.S.</u> , 336 F.2d 678, cert. den. <u>Richards v. U.S.</u> , 380 U.S. 909, 85 S.Ct. 894 (C.A. Cal., 1964)	19
<u>Todisco v. U.S.</u> , 298 F.2d 208, cert. den. 368 U.S. 989, 82 S.Ct. 602 (C.A. 9, Cal., 1961).	19
<u>U.S. v. Knoch</u> , 379 F.2d 427, 470 (2nd Cir., 1967), cert. den., 389 U.S. 973, 88 S.Ct. 472 (1967).	21
<u>U.S. v. Madda</u> , 345 F.2d 400 (C.A. 7th, 1965)	19
<u>U.S. v. McKeever</u> , 169 F.Supp 426, (D.C. N.Y., 1958); 10 L.Ed.2d 1169 (1963); 58 A.L.R.2d 1024 (1958)	18
<u>U.S. v. Starks</u> , 515 F.2d 112 (C.A. 3, 1975).	21

QUESTIONS PRESENTED

1. Whether the Trial Court Erred by its Denial of the Defendant's Motion for a Mistrial, Based Upon Prejudicial Remarks of the Prosecutor Made in the Presence of the Jury.

2. Whether the Trial Court Erred in Admitting Into Evidence a Tape Recorded Conversation of the Defendant Without A Proper Foundation Having Been Laid to Establish its Authenticity.

PRELIMINARY STATEMENT

The defendant-appellant, Edward Moore, appeals from a judgment of the United States District Court, Eastern District of New York, (Judge Mark Constantino and a jury), adjudging the defendant-appellant guilty of a Conspiracy to commit offenses in violation of Title 18 U.S.C. Sections 495 and 1708, to wit: to utter and possess stolen United States Treasury checks which were the contents of letters stolen from the United States mail; and of ten substantive counts of uttering and possessing various United States Treasury checks which had been stolen from the United States mails.

The defendant-appellant, Edward Moore, was sentenced to four years incarceration on this conviction and is presently on bail pending the final determination of the instant appeal.

STATEMENT OF FACTS

A. The Government's Case.

Part of the Government's proof against Edward Moore consisted of testimony of three former narcotic addicts who testified that they provided the defendant with numerous checks stolen from postmen and mailboxes throughout the Borough of Brooklyn.

MELVIN SHELTON testified that he was introduced to the defendant through a female known as Jackie. Shelton had approached this Jackie to find an outlet for various checks which he and another had stolen from the United States Mails. Upon being referred to the defendant, Shelton entered into an agreement whereby he was to receive fifty percent of the face value of the checks he delivered to the defendant. As a method of bookkeeping, Shelton testified that he was assigned a code letter by the defendant which later was marked on the checks to identify him as the person responsible to the defendant in the event that the checks failed to clear when presented for payment.

Shelton further testified that in addition to stealing checks from mailboxes, he received large numbers of checks from a corrupt postal employee. This relationship continued for several months until a dispute arose between the defendant and himself over certain checks which failed to clear. Through the

course of his testimony, he identified several checks from various Government exhibits as being checks that he negotiated through the defendant.

The next Government witness, ROBERT LEE COLLINS, stated that he also knew the defendant and had negotiated several stolen checks through the defendant with the same fifty percent of the face value agreement as indicated by Shelton. Collins also indicated that he, too, became aware of the defendant through his girlfriend "Jackie". Collins testified that for most of his transactions, he wouldn't deal directly with the defendant, but dealt through Jackie as a intermediary. He further testified that he came into possession of the checks by breaking into mailboxes and that he and Jackie would forge the names of the various payees before turning the checks over to the defendant. Like the previous Government witness, Collins identified several checks as being among those which he previously negotiated through the defendant.

JACQUELINE MURPHY next testified that she had received numerous stolen checks from both Shelton and Collins. Upon receipt, she would then negotiate the checks with the defendant under the fifty percent of the face value of the checks as previously testified to. She also stated that during the period of her dealing with the defendant, she was addicted to heroin and would use the money received from the sale of the checks to support her addiction.

Like the previous two witnesses, she identified several checks from Government's Exhibit "1" as being checks she endorsed and negotiated through the defendant. In addition, she testified that she recorded a conversation between herself and the defendant under directions of detectives from the Department of Investigations for the City of New York. This taped conversation with the defendant was then introduced as a Government exhibit.

The next Government witness to testify was not named as an accomplice of the defendant, but worked as a secretary in the defendant's church during the period of the conspiracy alleged in the indictment.

ANTONIA RILEY testified that during the period she was employed as the defendant's secretary, she had occasion to observe the defendant in possession of numerous bundles of checks which were at times two or three inches thick.

Miss Riley testified that she would often accompany the defendant to the Brownsville Community Credit Union where he would make large deposits of checks which he had received at his church. On one occasion, she observed a postman come into the defendant's church and hand the defendant a package of green and brown checks. She testified that on that occasion, the defendant requested that she compute the amount of the checks and to divide the checks into two separate bundles.

Miss Riley also testified that she had been instructed

by the defendant to copy the names of the various payees on the checks and to enter the same in the defendant's church membership lists. When she inquired about the checks, she testified that the defendant had told her not to worry about them because he had a good connection at the post office.

One of the tellers at the Brownsville Community Credit Union, ELVIRA VALENTIN, was the next Government witness. The thrust of Miss Valentin's testimony was that on several occasions, she accepted large deposits of checks at the Credit Union from the defendant. She remembered that most of the checks deposited by the defendant were Welfare checks and Social Security checks. The defendant's accounts at the Credit Union were identified through this witness. Miss Valentin accepted these checks from the defendant without requiring him to personally endorse the same. She testified that she had been instructed by the co-defendant, William Laing, that the defendant Moore was not required to endorse the checks and that the presence of his account number on the back of the checks was a sufficient endorsement.

RONALD REMSEN, the senior bookkeeper at the Credit Union was next called to testify. He testified that the standing policy at the Credit Union for cashing third-party checks was to require the Credit Union member to personally endorse the checks. Various record keeping exhibits reflecting the banking activities of the defendant's accounts during the period of the conspiracy were introduced through this witness.

DOROTHY J. DEVOUSE, a former member of the Board of Directors at the Credit Union, testified that on July 1, 1974, at a board of directors meeting the defendant Moore denied bringing ninety-two checks on a single occasion to be deposited into his account; and that any checks he had brought in he had endorsed. She stated that the defendant informed the Board that he had not brought any checks into the Credit Union since January of 1974. She also attributed a statement to the defendant that if he burned, someone else would burn with him.

Inspector JOSEPH FILECCIA of the United States Postal Service next testified that he examined the Credit Union ledger sheets relation to the personal account of Edward Moore, Act Number 1822, and the joint account of Moore and Laing under the name of the Universal Science Church of God, Account Number 3050. The Inspector prepared a computation of the total deposits in the accounts in question, which amounted to \$194,064.64; and the total withdrawals amounted to \$177,494.57.

The Government then introduced previous Grand Jury testimony of the defendant Laing given on March 2, 1976 and on March 9, 1976.

Two Government witnesses were called to establish that the checks in question were duly deposited in the mails in the regular course of business of the Social Services Department of the City of New York and the United States Treasury Department.

A stipulation of handwriting was then offered in evidence which indicated that the defendant Moore wrote the Eddie Moore signature in the "received by" boxes on various debit vouchers which were Government Exhibits "14-1" and "14-2"; and that the defendant Edward Moore wrote the endorsement on each of the thirty-three checks included in Government Exhibit "10". That the defendant Edward Moore wrote the Moore signatures in the "received by" boxes on each of the 83 check stubs in Government Exhibit "9".

B. The Defendant's Case.

Reverend Moore took the witness stand and testified in his own behalf. He testified that he ran a health food store during the time in question and that he would legitimately cash checks for various customers during the course of a normal business day. He would then take these checks to the Credit Union, personally endorse them and deposit the checks into his accounts. He denied ever cashing any checks at the Credit Union by solely using his account number as an endorsement. Each and anytime he made any check deposits at the Credit Union, he would presumably endorse the back of the checks with his own signature.

He admitted that he would go to the Credit Union to make deposits on almost a daily basis, but stated that this was to make perfectly legitimate transactions.

He further testified that he incorporated a store front church and relied heavily upon the co-defendant Laing to look after the financial record keeping of the Church. He stated that he turned over all of his credit union account books to Mr. Laing and trusted Laing to keep them in order. The physical custody of the three account books was with Laing throughout the period when large numbers of stolen and forged checks were passing through his accounts. Reverend Moore stated that he didn't get the books back from Laing until a time after the check cashing through his accounts ceased.

Reverend Moore admitted signing the "received by" boxes in the debit vouchers of the credit union; and also admitted the fact that withdrawal checks bore his endorsements. He explained the presence of his signature on these items through directions he would receive from the co-defendant. Mr. Laing would ask him to sign these items while blank and Moore would do so, not knowing what amounts were later added by Laing.

The total withdrawals that Reverend Moore personally made were in the area of \$16,000.00 to \$18,000.00; and he disavowed ever receiving any money as indicated by the Government in the area of \$135,000.00 in withdrawals from the Credit Union.

Reverend Moore denied ever seeing Melvin Shelton on any prior occasion and denied that he ever received any checks from Shelton.

He admitted knowing Jacqueline Murphy and stated that he had only seen Robert Lee Collins on one or two occasions previously.

He denied the testimony of Shelton, Murphy and Collins about paying them fifty percent of the face value of the checks and stated that he had no knowledge whatsoever that his accounts were being used in a manner wherein large numbers of stolen checks were being passed through them.

THE COURT ERRED IN NOT GRANTING A MISTRIAL WHERE GOVERNMENT'S COUNSEL REPEATEDLY PREJUDICED THE DEFENDANT BY HIS QUESTIONS AND REMARKS MADE IN THE PRESENCE OF THE JURY.

The question of the defendant Moore's participating in and organizing an illegal check cashing scheme was the ultimate fact for the jury to be proven by the Government.

The presumption of innocence surrounding Moore throughout the trial could at no time be overlooked by the Government's attorney or the Court, no matter how strong the Government's proof may have been.

During the course of the trial, the prosecuting attorneys questioned Reverend Moore's co-defendant concerning his knowledge of a check fencing scheme taking place at the Brownsville Community Credit Union.

The U.S. Attorney repeatedly questioned Laing about his being drawn into a massive check fencing scheme by Moore. This question about Moore's having succeeded in getting Laing right into the middle of his (Moore's) check fencing operation was objected to and sustained by the Court (Appendix page 53a).

The U.S. Attorney persisted in this line of questioning at length, and by the form of his questions assumed that Moore's guilt was a foregone conclusion at this stage of the trial. The ultimate fact of the appellant's guilt or innocence was a determination to be made by the jury and not by the Assistant U.S. Attorney.

The prosecutor, instead of questioning the co-defendant, placed his own credibility into the case by flatly stating, "He, in fact, succeeded in getting you into it right in the middle of his check fencing operation." (Appendix page 53a).

By this entire line of questioning concerned with Laing's knowledge of the existence of an illegal check cashing scheme, the U.S. Attorney squarely placed his own belief of Moore's guilt before the jury which had yet to find Moore guilty of anything.

In the midst of these opinion-loaded questions, an extremely prejudicial remark was made in the presence of the jury by the U.S. Attorney.

"Wasn't it a little like Willie Sutton asking J. Edgar Hoover for a lift to the nearest bank?" (Appendix page 61a).

Equating the defendant Moore with Willie Sutton, an infamous criminal whose reputation for criminal behavior is well known to the public, was grossly improper and seriously jeopardized any benefit which Moore might yet derive from the presumption of innocence even at this late stage of the Government's proof.

The Trial Court commented that the U.S. Attorney's question of equating the defendant Moore with Willie Sutton was "a bad question"; but did nothing to purge the prejudicial effect this comment coming from the Government's own attorney had to have upon the jury.

The Court below made light of the prejudice of the Willie Sutton reference by stating that the jurors didn't know who Willie Sutton and J. Edgar Hoover were (App. p. 64a). The appellant submits that the Court was wrong in this respect given the notoriety associated with both individuals in this area.

The appellant's counsel moved for a mistrial because of the prejudice inherent in the prosecutor's remark. This application was denied.

The Court did instruct the jury on the presumption of innocence in an attempt to cure the effect of the prosecutor's putting his own belief of the guilt of the defendant before the jury (App 65-66a); but at no time was the prejudice to the defendant Moore caused by the Prosecutor's remarks about Willie Sutton ever cured by the Court.

The standard of conduct for a United States Attorney has been clearly set forth in McMillian v. United States, 363 F.2d 165 (5th Cir., 1966), and Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). "He is to prosecute with earnestness and vigor -- indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones..." 295 U.S. at 88, 55 S.Ct. at 633, 79 L.Ed. at 1321.

The Code of Professional Responsibility of the American Bar Association states a lawyer shall not: "... (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other

person...". American Bar Association Code of Responsibility, Disciplinary Rule, 7-106(c)(2) page 88 (1969).

The reference to "Willie Sutton" was a prejudicial remark of the type that was extremely unfair to the defendant. A jury could never erase this improper association from their minds and, indeed, were never directed to do so. Highly prejudicial remarks of this nature are especially likely to stick in the minds of the jury and can very well influence its deliberation. Hall v. United States, 419 F.2d 582 (5th Cir., 1969); Bruce v. Estelle, 483 F.2d 1031 (5th Cir., 1973); Gradsky v. United States, 373 F.2d 706 (5th Cir., 1967).

The remark did not stand there alone as an isolated comment. It was made in the midst of a long series of questions wherein the Government's attorney, by his own statements and questions, directly placed his own belief of Moore's guilt before the jury.

The Court's charge to the jury, at that point, made no reference to the prejudicial statements made by the United States Attorney and did not cure the harm created by this improper and unfortunate reference.

The prejudice to the defendant can not be measured and because of the nature of the reference, the Court erred in not curing the effect that this comment had on the jury and the defendant did not receive a fair trial to which he is entitled.

THE TRIAL COURT ERRED IN ADMITTING
INTO EVIDENCE A TAPE RECORDED CON-
VERSATION OF THE DEFENDANT WITHOUT
A PROPER FOUNDATION HAVING BEEN
LAID TO ESTABLISH ITS AUTHENTICITY

A vital element of the Government's proof was a tape recording of a conversation between the defendant Moore and a Government witness, Jacqueline Murphy, which purportedly took place at the defendant's Church on July 31, 1974.

This exhibit (Government's Exhibit 2-3) was placed in evidence through the testimony of two New York City Police Officers. Detective David Johnson, from the Department of Investigation, was first called to testify about the fact that a taped conversation was made on July 31, 1974, between Moore and Murphy; and to identify Government's Exhibit 2-3 as being the original tape recording of that conversation.

Johnson testified that on July 31, 1974, a concealable taping device known as a Nagra recorder was placed on the person of Miss Murphy and that he accompanied him to the defendant's Church and that he observed Miss Murphy entering the Church while wearing the device. (App 17-18a) He further testified that she was in that location for approximately thirty minutes; and that upon leaving she removed the machine and he took possession of it.

Nothing was stated by Johnson in his direct testimony as to what physically happened to the tape or the machine from that point forward. He testified that Government's Exhibit 2-3

was the same tape as was in the machine worn by Miss Murphy on July 31, 1974. He stated that he knew it to be the original tape of that critical conversation by certain markings contained on the reel in which the tape was contained. The tape was then offered in evidence, counsel for the defendant objected, and requested a voir dire on the authenticity of the tape and that such be conducted outside of the hearing of the jury.

The Court granted the application and the voir dire of Detective Johnson on the custody of the tape was had outside the hearing of the jury (Appendix page 21a-22a).

During the voir dire, Johnson stated that after removing the tape recording device from Murphy, he delivered it to the Department of Investigations; and that he never listened to the original conversation prior to turning the tape over.

He was unable to testify what conversation was on the original tape, nor how many times between August 1, 1974, and December 16, 1976, the original tape recording was removed from the tape custody vault at the Department of Investigations. He did testify that in his opinion, because of his office's procedure, the tape was in the Department of Investigations control from August 1, 1974, to December 16, 1976.

He further testified that the original tape was never sealed at any time, but was kept in a compartment where five or six different individuals had continual access to that area (Appendix pages 26a-27a).

The only way he knew Government's Exhibit 2-3 to be one and the same as the tape made by Miss Murphy on July 31, 1977, was the marking on the reel in which it was contained (App p 28a). He further admitted that he had never listened to Government's Exhibit 2-3 even up to the time of his giving testimony at the trial.

Counsel continued to press his objection on the grounds that the authenticity of the tape had not been established; and that the Government had not established a sufficient claim of possession to show that the tape had not been tampered with (Appendix page 29a).

The Court apparently realizing that Detective Johnson's testimony was insufficient, directed that the Government call the custodian of the tapes to determine whether or not there was any accessibility to the tape (Appendix page 31a).

In a further effort to introduce the tape (Government's Exhibit 2-3), the Government next called Detective Thomas Scally of the Department of Investigation.

At this point, the Court, for no apparent reason, reversed itself and allowed the testimony and voir dire of Scally to be had in the presence of the jury where the voir dire of Johnson was conducted without the hearing of the jury.

Counsel for the defendant objected to this on the ground that the jury's hearing Scally and not having heard Johnson, that

they would be getting a truncated version of the authenticity of the Government's tapes (Appendix page 34a).

Detective Scally testified that his custody log indicated that the original tape of the Moore-Murphy conversation was first placed into its custody envelope on July 30, 1974; that it was next removed on January 22, 1976, by Detective Johnson and that it was returned on that same day, not by Johnson, but by a Mr. O'Brien.

On December 16, 1976, the tape was again removed, and that from that date to the date of his testimony (January 10, 1977) he had no idea as to the custody of the Exhibit. He further admitted that because of the lack of custody and control over the tape, that it was possible that the tape could have been tampered with (Appendix page 44a).

Detective Johnson was recalled and explained that on January 22, 1976, he removed the tape from the Department of Investigation archives and gave it to an Agent Anthony who listened to the tape and then returned it. Johnson indicated that he did not remain with Anthony while he listened to the tape (App p 48-49a). It was not established that the tape was exactly the same as when Johnson had first seen it on July 30, 1974.

Neither of the two Government witnesses could establish the authenticity of this Exhibit. The chain of custody of the Exhibit had not been established; nor was the integrity of the

of the Exhibit established to adequately exclude the possibility of having been tampered with.

Tape recordings have been deemed admissible in evidence providing a proper foundation is laid for their admission. Gellars v. United States, 87 App. D.C. 16, 182 F.2d 962 (1950); Burgman v. U.S., 88 App. D.C. 184, 188 F.2d 637, cert. den. 342 U.S. 838, 72 S.Ct. 64 (1951). What constitutes a proper foundation for the admission of tape recordings has been established through case law. The following criteria has been accepted as prerequisites for the introduction of sound recordings:

- (1) A showing that the recording device was capable of taking testimony;
- (2) A showing that the operator of the device was competent;
- (3) The establishment of the authenticity and correctness of the recording;
- (4) A showing that changes, additions or deletions have not been made;
- (5) A showing of the manner of the presentation of the recordings;
- (6) Identification of the speakers;
- (7) A showing that the testimony elicited was voluntarily made without any kind of inducement.

U.S. v. McKeever, 169 F.Supp. 426 (D.C. N.Y. 1958); See 10 L.Ed.2d 1169 (1963); 58 A.L.R.2d 1024 (1958).

The determination of whether the Government has established a proper foundation for the admission in evidence of a tape recorded conversation is a question for the trial court to

decide before the tape is accepted into evidence. Brandow vs. U.S., 268 F.2d 559 (1959); U.S. v. Madda, 345 F.2d 400 (C.A. 7th, 1965).

The question for the appellate courts is confined to determining whether the trial judge abused his discretion in determining whether a prima facie case had been made by the Government before a tape recording is admitted into evidence. Spindler v. U.S., 336 F.2d 678, cert. den. Richards v. U.S., 85 S.Ct. 894, 380 U.S. 909 (C.A. Cal., 1964).

In those instances where the admissibility of a tape recorded conversation is at issue, the apparent proper procedure is for the trial court to determine this issue out of the presence of the jury. Monroe v. U.S., 98 App. D.C. 228, 234 F.2d 49, cert. den. 352 U.S. 873, 77 S.Ct. 94 (1956); Todisco v. U.S., 298 F.2d 208, cert. den., 368 U.S. 989, 82 S.Ct. 602 (C.A. 9, Cal., 1961).

In the instant case, the Court below abused its discretion in two ways. In the first instance, the Court heard the voir dire testimony of Johnson out of the presence of the jury, which appears to be the Court's manner of proceeding. Then, when Johnson's testimony didn't suffice, the Government called Detective Scally whose testimony was taken in the presence of the jury. Detective Johnson was recalled and a portion of his continued testimony on the chain of custody was taken in front of the jury;

and the tape in question (Government's Exhibit 2-3) was admitted in evidence. What the jury heard was a truncated version of the defendant's legitimate effort testing the authentic nature of the exhibit being introduced. The defendant has a right to challenge the authenticity of the exhibit and since the laying of a proper foundation is a question of law for the Court to decide, he has a right to have this done outside of the hearing of the jury.

It is prejudicial to a defendant to have half the voir dire done solely in the presence of the Court and another half done in the presence of the jury. The jury, being unfamiliar with the technical nature of the concepts of authenticity and chain of custody is likely to believe that counsel is raising purely technical objectives to the evidence.

The second abuse of discretion by the trial court was admitting the tape (Government's Exhibit 2-3) without having adequately established its chain of custody.

Both Government witnesses were not adequately able to account for the chain of custody of the exhibit; and neither could categorically testify that the tape had not been tampered with or altered.

Where the authenticity of a tape recording is challenged it is the burden of the Government "to produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of such recordings...". United States v. Knohl,

379 F.2d 427, 470 (2nd Cir., 1967), cert. den., 389 U.S. 973, 80 S.Ct. 472 (1967).

Because tape recordings are peculiarly susceptible to alteration, tampering and selective edition, the question of chain of custody is critical to their being admitted into evidence.

The defendant asks this Court to follow the rule set forth in U.S. v. Starks, 515 F.2d 112 (1975), which requires the party offering a tape recording exhibit to establish its chain of custody as part of a proper foundation for its admission.

"When a colorable attack is made as to a tape's authenticity and accuracy, the burden on those issues shifts to the party offering the tape, and the better rule requires that party to prove its chain of custody. Such a demand was made by defendants, resisted by the government, and refused by the trial court. The government contends that the presumption of regularity which attaches to the handling of evidence within the control of public officials overcomes the chain of custody problem. The cases relied upon, principally United States v. Daughtry, 502 F.2d 1019, 1021 (5th Cir., 1974) suggest that when evidence of a physical or documentary nature has been introduced, the trial court is entitled to assume that public officials did not tamper with exhibits in their possession in the absence of some evidence suggesting otherwise. No authorities in this circuit standing for such a rule have been called to our attention. The presumption of regularity, if it can be dignified as a rule, does not serve as a substitute for evidence when authenticity is, as here, challenged on not insubstantial grounds. At best, it may relieve the government of the necessity for offering proof of custody until the integrity of the evidence has been put in issue. Here, as early as the May 3rd, pretrial conference, there were extant several versions or copies of the tape of varying degrees of intelligibility. The defendants put the government on notice that they questioned the tape's authenticity. If there is a presumption of regularity it cannot in these circumstances substitute for evidence or shift to the defendants the burden of disproving authenticity. Therefore, the erroneous admission of G-3, requires a new trial."

In the instant case, the chain of custody was not established and it was error for the Court to admit Government's Exhibit 2-3 in evidence.

CONCLUSION

WHEREFORE, the conviction of the defendant-appellant EDWARD MOORE, should be reversed and a new trial ordered.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

BRIGID E. WHELAN, being duly sworn, deposes and states:

That I am not a party to this action; I am over 18 years of age and I reside at Woodside, New York.

That on the 1st day of August, 1977, I served the within Brief for the Defendant-Appellant, Edward Moore, and Appellant's Appendix, upon Richard Brewster, Esquire, attorney for the United States in this action, at the U.S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, the address designated for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Brigid E. Whelan

Sworn to before me, this
1st day of August, 1977.

Mansukhlal A. Koya

MANSUKHLAL A. KOYA
Notary Public, State of New York
No. 41-4624816
Qualified in Queens County
Commission Expires March 30, 1978